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MODESTA JACINTO,

Plaintiff,

v.

DITECH FINANCIAL LLC, et al.,

Defendants.

Case No. 16-cv-02815-MMC

**ORDER GRANTING DEFENDANTS
DITECH AND MERS' MOTION TO
DISMISS; AFFORING PLAINTIFF
LEAVE TO AMEND; CONTINUING
CASE MANAGEMENT CONFERENCE**

Before the Court is the "Motion to Dismiss First Amended Complaint," filed July 12, 2016, by defendants Ditech Financial LLC ("Ditech") and Mortgage Electronic Registration Systems, Inc.'s ("MERS") (collectively, "Moving Defendants").¹ Plaintiff Modesta Jacinto has filed opposition, to which Moving Defendants have filed a reply. Having read and considered the papers filed in support of and in opposition to the motions, the Court rules as follows.²

BACKGROUND

On or about February 17, 2006, plaintiff obtained a loan from Homecomings Financial Network, Inc. ("Homecomings") in the amount of \$275,000; the loan was in the form of a promissory note secured by a deed of trust ("Deed of Trust") on real property located in Healdsburg, California, which Deed of Trust was recorded in Sonoma County,

¹ The instant action was removed from state court by Moving Defendants. Before the removal, a third defendant, National Default Servicing Corporation ("NDSC"), filed a "Declaration of Non-Monetary Status" in state court, and consented to removal of the action to federal court. (See Not. Removal Ex. B, Ex. 4.) NDSC has not filed a motion to dismiss or joined in the instant motion.

² By order filed September 16, 2016, the Court took the motion under submission.

1 California. (See First Amended Complaint ("FAC") ¶¶ 2, 11, 12, 13.)

2 On or about June 14, 2012, defendant MERS, as "nominee" for Homecomings,
3 assigned the Deed of Trust to GMAC Mortgage, LLC ("GMAC"). (See *id.* ¶¶ 8, 14-15.)
4 On or about May 16, 2013, GMAC assigned the Deed of Trust to Green Tree Servicing
5 LLC, doing business as Ditech Financial LLC. (See *id.* ¶ 16.)

6 On or about November 9, 2015, defendant NDSC, as trustee for defendant Ditech,
7 recorded in Sonoma County a "Notice of Default and Election to Sell Under Deed of
8 Trust." (See *id.* ¶¶ 6, 17.)³ To date, no foreclosure sale has been conducted. (See *id.*
9 ¶ 85 (seeking order enjoining defendants from conducting foreclosure sale).)

10 Plaintiff alleges the above-referenced assignments were defective, and, based
11 thereon, asserts seven Causes of Action, titled, respectively, "Wrongful Foreclosure,"
12 "Violation of Civil Code of Procedure § 2924(a)(6)," "Violation of Civil Code of Procedure
13 § 2924.17," "Violation of the Covenant of Good Faith and Fair Dealing," "Violation of
14 California Bus. & Prof. Code Sections 17200 et seq.," "Declaratory Relief," and "Equitable
15 Estoppel."

16 **LEGAL STANDARD**

17 Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure "can be
18 based on the lack of a cognizable legal theory or the absence of sufficient facts alleged
19 under a cognizable legal theory." See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
20 699 (9th Cir. 1990). Rule 8(a)(2), however, "requires only 'a short and plain statement of
21 the claim showing that the pleader is entitled to relief.'" See Bell Atlantic Corp. v.
22 Twombly, 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). Consequently, "a
23 complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual
24 allegations." See id. Nonetheless, "a plaintiff's obligation to provide the grounds of his
25 entitlement to relief requires more than labels and conclusions, and a formulaic recitation

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27 ³ The FAC's initial reference to said date as "November 9, 2016" (see FAC ¶ 17),
28 appears to be a typographical error (see *id.* ¶¶ 96, 104, 108, 109 (alleging notice was
recorded on "November 9, 2015")).

1 of the elements of a cause of action will not do.” See id. (internal quotation, citation, and
2 alteration omitted).

3 In analyzing a motion to dismiss, a district court must accept as true all material
4 allegations in the complaint, and construe them in the light most favorable to the
5 nonmoving party. See NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). “To
6 survive a motion to dismiss, a complaint must contain sufficient factual material, accepted
7 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S.
8 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). “Factual allegations must be
9 enough to raise a right to relief above the speculative level[.]” Twombly, 550 U.S. at 555.
10 Courts “are not bound to accept as true a legal conclusion couched as a factual
11 allegation.” See Iqbal, 556 U.S. at 678 (internal quotation and citation omitted).

12 DISCUSSION

13 A. First Cause of Action: “Wrongful Foreclosure”

14 In the First Cause of Action, plaintiff alleges defendants are attempting to foreclose
15 on her home “without any legal authority or standing to do so” (see FAC ¶ 84) because,
16 according to plaintiff, the assignments of the Deed of Trust from Homecomings to GMAC
17 and from GMAC to Ditech are void (see id. ¶¶ 73-75).

18 At the outset, Moving Defendants, citing, inter alia, Jenkins v. JP Morgan Chase
19 Bank, N.A., 216 Cal. App. 4th 497 (2013), contend plaintiff cannot bring a wrongful
20 foreclosure claim before a foreclosure sale has occurred. See id. at 511 (“California
21 courts have refused to delay the nonjudicial foreclosure process by allowing trustor-
22 debtors to pursue preemptive judicial actions to challenge the right, power, and authority
23 of a foreclosing ‘beneficiary’ or beneficiary’s ‘agent’ to initiate and pursue foreclosure.”).
24 In response, plaintiff cites to a recent decision, Yvanova v. New Century Mortgage
25 Corporation, 62 Cal. 4th 919 (2016), wherein the California Supreme Court held that “a
26 borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for
27 wrongful foreclosure based on an allegedly void assignment merely because he or she
28 was in default on the loan and was not a party to the challenged assignment.” See id. at

1 924. The holding in Yvanova, however, was expressly limited to post-foreclosure
2 challenges. See id. (“We do not hold or suggest that a borrower may attempt to preempt
3 a threatened nonjudicial foreclosure by a suit questioning the foreclosing party’s right to
4 proceed.”). Here, no foreclosure sale has occurred, and, consequently, plaintiff’s
5 wrongful foreclosure claim is premature. See, e.g., Jenkins, 216 Cal. App. 4th at 511.
6 Moreover, even if not premature, none of plaintiff’s allegations, as discussed below, sets
7 forth a cognizable ground upon which to challenge a foreclosure sale.

8 Plaintiff alleges her promissory note and Deed of Trust were sold into a securitized
9 trust formed pursuant to New York law (see FAC ¶¶ 18, 19, 77) but that neither document
10 was properly assigned into such trust pursuant to the trust’s governing “Pooling and
11 Servicing Agreement” (“PSA”) (see id. ¶¶ 22, 26, 70-71). In particular, plaintiff first
12 alleges that the assignments of the Deed of Trust from Homecomings to GMAC and from
13 GMAC to Ditech are in violation of the PSA because, according to plaintiff, both occurred
14 after the closing date of the trust. (See id. ¶¶ 72-75.) Further, plaintiff alleges, even if the
15 Deed of Trust had been transferred into the securitized trust by its closing date, the
16 promissory note would not have been transferred into such trust in accordance with the
17 PSA, which, according to plaintiff, requires “a complete and unbroken chain of transfers
18 and assignments to and from each intervening party.” (See id. ¶ 76.)

19 In Yvanova, the California Supreme Court held that a borrower may base a
20 wrongful foreclosure action upon “an allegation that the assignment was void, and not
21 merely voidable at the behest of the parties to the assignment.” See Yvanova, 62 Cal.
22 4th at 923. As explained therein, a void contract is “without legal effect” from the start,
23 and “neither action nor inaction of a party to it can validate it,” see id. at 929 (internal
24 quotation and citation omitted), whereas a voidable contract “may be declared void but is
25 not void in itself,” as any defects are “subject to ratification by the parties,” see id. at 930.

26 Citing Glaski v. Bank of America, N.A., 218 Cal. App. 4th 1079 (2013), plaintiff
27 argues the alleged violations of the PSA render the assignments void. In Glaski, the
28 California Court of Appeal, in considering a securitized trust formed under New York law

1 and governed by a PSA that established “a closing date after which the trust may no
2 longer accept loans,” see id. at 1096, held that any “[t]ransfers that violate the terms of
3 the trust instrument are void under New York trust law.” See id. at 1083. Subsequent
4 thereto, however, the Second Circuit, having conducted a thorough review of New York
5 case law, “conclud[ed] that as unauthorized acts of a trustee may be ratified by the trust’s
6 beneficiaries, such acts are not void but voidable,” see Rajamin v. Deutsche Bank Nat.
7 Trust. Co., 757 F.3d 79, 90 (2d Cir. 2014), and a New York appellate court thereafter
8 overturned the trial court decision upon which Glaski had relied, see Wells Fargo Bank,
9 N.A. v. Erobobo, 9 N.Y.S.3d 312, 314 (N.Y. App. Div. 2015) (holding borrower may not
10 bring claim “based upon purported noncompliance with certain provisions of the PSA”).
11 More recently, both the Ninth Circuit and the California Court of Appeal have held an act
12 in violation of a trust agreement, such as a PSA, is voidable, not void, under New York
13 law. See Morgan v. Aurora Loan Services, LLC, 646 Fed. App’x 546, 550 (9th Cir. 2016)
14 (holding “act in violation of a trust agreement is voidable—not void—under New York
15 law”); Yhudai v. Impac Funding Corp., 1 Cal. App. 5th 1252, 1259 (2016) (holding “a
16 post-closing assignment of a loan into an investment trust that violates the terms of the
17 trust renders the assignment voidable, not void, under New York law”); Saterbak v.
18 JPMorgan Chase Bank, N.A., 245 Cal. App. 4th 808, 815 (2016) (holding assignment of
19 loan to securitized trust after closing date was “merely voidable” under New York law).

20 Accordingly, plaintiff’s First Cause of Action is, on both procedural grounds and on
21 the merits, subject to dismissal without leave to amend.⁴

22 **B. Second Cause of Action: “Violation of Civil Code of Procedure**
23 **§ 2924(a)(6)”**

24 In the Second Cause of Action plaintiff alleges defendants violated § 2924 (a)(6) of
25 the California Civil Code, which provides as follows:

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27 ⁴ Given such ruling, the Court does not address herein Moving Defendants’
28 argument that the FAC does not contain sufficient factual allegations, such as the name
of the securitized trust or the date the loan was transferred into the securitized trust.

No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest.

Cal. Civ. Code § 2924(a)(6). Plaintiff alleges MERS, Ditech, and NDSC “do not have standing to record a [n]otice of [d]efault.” (See FAC ¶ 100.)

Plaintiff brings her claim under three theories. First, she alleges § 2924(a)(6) “states that for an entity to properly record a notice of default, that entity must be entitled to enforce both the [n]ote and the [d]eed of [t]rust.” (See FAC ¶ 91 (emphasis omitted).) The statute includes no such requirement; rather, it requires only that the entity either hold the beneficial interest, be a designated agent of such holder, or be the original or substituted trustee under the deed of trust. See Cal. Civil Code § 2924(a)(6).

Second, plaintiff alleges “the note and the [d]eed of [t]rust must remain together” in order for an entity to be the “holder of the beneficial interest.” (See FAC ¶ 92.) Contrary to such allegation, however, the procedures to be followed under California’s nonjudicial foreclosure law “do not require that the note be in the possession of the party initiating the foreclosure.” See Debrunner v. Deutsche Bank Nat. Trust Co., 204 Cal.App.4th 433, 440 (2012).

Third, plaintiff alleges defendants do not have “standing” to record the notice of default. (See FAC ¶ 97.) To the extent such theory relies on the defects alleged in the First Cause of Action, the claim also fails, as “no injunctive relief is available” for a violation of § 2924(a)(6). See Lucioni v. Bank of America, N.A., 3 Cal. App. 5th 150, 155 (2016).

Lastly, as Moving Defendants correctly argue, the Second Cause of Action, to the extent brought against MERS, fails for the additional reason that the FAC alleges no facts suggesting MERS had any role in the challenged recordation or otherwise in the

1 foreclosure process. Section 2924(a)(6) applies to entities that either “record . . . a notice
2 of default” or “cause [such notice] to be recorded.” See Cal. Civ. Code § 2924(a)(6).
3 Here, plaintiff alleges NDSC recorded the notice “on behalf of” Ditech (see FAC ¶ 96) and
4 that MERS assigned its interest in the Deed of Trust in 2012, more than three years
5 before the notice of default allegedly was entered (see *id.* ¶¶ 14-15).

6 Accordingly, the Second Cause of Action is subject to dismissal without leave to
7 amend.

8 **C. Third Cause of Action: “Violation of Civil Code of Procedure
9 § 2924.17”**

10 In the Third Cause of Action, plaintiff alleges Ditech and NDSC violated
11 § 2924.17(b) of the California Civil Code, which requires that a mortgage servicer, “before
12 recording or filing,” amongst other things, a notice of default, “ensure that it has reviewed
13 competent and reliable evidence to substantiate the borrower’s default and the right to
14 foreclose, including the borrower’s loan status and loan information.” See Cal. Civ. Code
15 § 2924.17(a)-(b).⁵

16 In support of such claim, plaintiff alleges that, if Ditech and NDSC had “reviewed
17 her file competently,” they “would have seen” their “fail[ure] to put the correct amount
18 owed in the [n]otice of [d]efault” (see FAC ¶ 107) and would not have “record[ed] a
19 [n]otice of [d]efault with improperly verified loan status and loan information” (see *id.*
20 ¶ 109.).⁶ As Moving Defendants point out, however, plaintiff fails to provide any factual

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⁵ The Court notes that plaintiff seeks, *inter alia*, “statutory damages” as relief for
the alleged § 2924.17 violation. (See FAC ¶ 112). A plaintiff is not entitled to such
damages until “[a]fter a trustee’s deed of sale has been recorded.” See Cal. Civ. Code
§§ 2924.12(b), 2924.19(b).

⁶ In her opposition, plaintiff states the Third Cause of Action should be understood
to be based additionally on her allegations that defendants “did not have proper standing
to initiate foreclosure proceedings.” (See Pl.’s Opp. at 12:23-28.) Assuming the FAC can
reasonably be interpreted in such a manner, the claim nonetheless would appear to fail.
See *Lucioni*, 3 Cal. App. 5th at 163 (holding § 2924.17 “does not create a right to litigate,
preforeclosure, whether the foreclosing party’s conclusion that it had the right to foreclose
was correct”) (emphasis omitted).

1 support for her claim. She does not allege the amount stated in the notice or what
2 amount should have been stated therein, nor does she identify what information, if any,
3 was improperly verified. Without such supporting facts, plaintiff's claim necessarily fails.
4 See Iqbal, 556 U.S. at 678-79 (holding complaint subject to dismissal where it lacks
5 "sufficient factual matter" to support its "legal conclusions"); see, e.g., Snyder v. Bank of
6 America, N.A., No. 15-CV-04228-EDL, 2016 WL 109981, at *7 (N.D. Cal., Jan. 8, 2016)
7 (holding that, "[w]ithout further explanation in the FAC, [p]laintiff's conclusory allegation
8 that the [m]oving [d]efendants failed to review competent and reliable evidence based
9 solely on the amount they claim she owed is insufficient to state a claim for violation of
10 California Civil Code § 2924.17").

11 Accordingly, the Third Cause of Action is subject to dismissal with leave to amend.

12 **D. Fourth Cause of Action: "Breach of the Covenant of Good Faith and**
13 **Fair Dealing"**

14 Plaintiff's Fourth Cause of Action alleges defendants breached the implied
15 covenant of good faith and fair dealing by (1) denying her "the benefits of the loan
16 contract which set [her] up for certain default" (see FAC ¶115 (emphasis omitted)), and
17 (2) "attempting to collect on [her] []loan without any lawful standing or authority to do so"
18 (see id.).

19 The former theory fails for lack of supporting factual allegations and the latter fails
20 for the reasons already discussed by the Court in Section A above. See Jenkins, 216
21 Cal. App. 4th at 528 (holding complaint "fails to satisfy the fundamental prerequisite for a
22 claim asserting a breach of the implied covenant of good faith and fair dealing—a specific
23 allegation [defendant's] actions did something to interfere with [plaintiff's] right to receive
24 the benefits of the agreement"); see also Saterbak, 245 Cal. App. 4th at 814-15 (holding
25 borrower "lacks standing to challenge alleged defects" in the assignment of a deed of
26 trust to a securitized trust where such claim is brought preforeclosure and the challenged
27 assignment is "merely voidable" under applicable law).

28 Accordingly, the Fourth Cause of Action is subject to dismissal with leave to

1 amend as to the former theory and without leave to amend as to the latter.

2 **E. Fifth Cause of Action: “Violation of California Bus. & Prof. Code**
3 **§ 17200 et. seq. and 17500 et seq.”**

4 In the Fifth Cause of Action, plaintiff alleges a violation of § 17200 of the California
5 Business and Professions Code (see FAC ¶ 121), which prohibits “any unlawful, unfair or
6 fraudulent business act or practice.” See Cal. Bus. & Prof. Code § 17200. In particular,
7 plaintiff alleges, defendants engaged in “deceptive business practices” by “marketing and
8 funding a predatory loan that obligated [plaintiff] to make payments well beyond what
9 [she] could afford” (see FAC ¶ 119), “attempting to collect on a debt that was void and
10 unenforceable” (see *id.*), and “fraudulently recommending, offering, marketing, accepting,
11 purchasing and or collecting on a debt/mortgage that they each knew or should have
12 known was void due to the illegal nature of the contract that would inevitably cause
13 default before completion of the loan term and was therefore unconscionable as a
14 violation of the public policy of promoting home ownership and preventing foreclosures”
15 (see *id.* ¶ 120.)

16 To the extent the cause of action is predicated on allegations of improprieties that
17 occurred at the time of loan origination, Moving Defendants argue plaintiff’s claim is
18 barred by the statute of limitations. The Court agrees such claim is subject to dismissal,
19 but with leave to amend. Claims asserted under § 17200 must be brought within four
20 years of the date upon which the cause of action accrues. See Cal. Bus. & Prof. Code
21 § 17208. Here, plaintiff alleges the promissory note and deed of trust were executed on
22 February 17, 2006. (See FAC ¶ 11.) She did not file the initial complaint in the instant
23 action, however, until April 4, 2016 (see Not. Removal Ex. A), more than ten years later,
24 and neither that pleading nor the FAC includes any factual allegations that would support
25 tolling of the statute of limitations. Moreover, plaintiff’s conclusory allegation that
26 defendants “market[ed] and fund[ed] a predatory loan that obligated [plaintiff] to make
27 payments well beyond what [she] could afford” (see FAC ¶ 119) lacks sufficient factual
28 support. See *Iqbal*, 556 U.S. at 678-79 (holding complaint subject to dismissal where it

1 lacks “sufficient factual matter” to support its “legal conclusions”).

2 Next, to the extent the cause of action is predicated on allegations that defendants
3 are attempting to collect on a void loan, it is derivative of the First Cause of Action and
4 consequently is subject to dismissal without leave to amend for the reasons stated in
5 Section A above. Lastly, to the extent the cause of action may be predicated on some
6 other unlawful, fraudulent, or unfair practice, it fails for lack of supporting factual
7 allegations, see id., and, consequently, is subject to dismissal with leave to amend.

8 Accordingly, the Fifth Cause of Action is subject to dismissal with leave to amend
9 as set forth above.

10 **F. Sixth Cause of Action: “Declaratory Relief”**

11 Plaintiff’s Sixth Cause of Action seeks a “judicial determination of [plaintiff’s] rights
12 and a declaration as to the duties and obligations of all [d]efendants in this controversy.”
13 (See FAC ¶ 130.) In support thereof, plaintiff alleges defendants have engaged in
14 “deceptive activity” (see id. ¶ 127), defendants have violated §§ 17200-17500 (see id.
15 ¶ 128), and that an “actual controversy” exists as to defendants’ “standing and capacity to
16 enforce any provisions within [the Deed of Trust and promissory note]” (see id. ¶ 129).

17 To the extent the cause of action is predicated on allegations that defendants are
18 attempting to collect on a void loan, it is derivative of the First Cause of Action and,
19 consequently, is subject to dismissal without leave to amend for the reasons stated in
20 Section A above.

21 To the extent the cause of action is predicated on allegations that defendants
22 violated §§ 17200-17500, it is derivative of the Fifth Cause of Action and, consequently, is
23 subject to dismissal with partial leave to amend for the reasons stated in Section E
24 above.

25 Accordingly, the Sixth Cause of Action is subject to dismissal with leave to amend
26 as set forth above.

27 **G. Seventh Cause of Action: “Equitable Estoppel”**

28 Plaintiff’s Seventh Cause of Action seeks an order by which defendants are

1 “estopped based on equitable considerations from taking any action to enforce the
2 contract in a detrimental manner against plaintiff, including, but not limited to, recording
3 any [n]otice of [d]efault and commencing any foreclosure proceedings on the subject real
4 property.” (See FAC ¶134.) In support thereof, plaintiff alleges defendants “seek to
5 foreclose . . . based on a void and unenforceable contract” and “knew or should have
6 known that the loan agreement which they claim ownership of and the right to enforce,
7 was illegal, fraudulent and unconscionable, and yet took the assignment of the interest in
8 the loan with such knowledge.” (See *id.* ¶ 133.)

9 As Moving Defendants note, equitable estoppel is a doctrine that is “defensive in
10 nature only” and “cannot be stated as an independent cause of action in California.” See
11 Moncada v. West Coast Quartz Corp., 221 Cal. App. 4th 768, 782 (2013).

12 Moreover, to the extent the cause of action is predicated on allegations that
13 defendants are attempting to collect on a void loan, it is derivative of the First Cause of
14 Action and consequently is subject to dismissal without leave to amend for the reasons
15 stated in Section A above.

16 Accordingly, the Seventh Cause of Action is subject to dismissal without leave to
17 amend.

18 **H. Non-Moving Defendant NDSC**

19 The deficiencies identified above are equally applicable to the sole non-moving
20 defendant, NDSC, which plaintiff alleges is the “foreclosure trustee.” (See FAC ¶ 6).
21 Accordingly, the complaint is subject to dismissal as against said additional defendant.
22 See Silverton v. Dep’t of Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981) (holding, where
23 court grants motion to dismiss complaint as to one defendant, court may dismiss
24 complaint against non-moving defendant “in a position similar to that of moving
25 defendants”).

26 **CONCLUSION**

27 For the reasons stated above, Moving Defendants’ motion to dismiss is hereby
28 GRANTED as follows:

1 1. To the extent the motion seeks dismissal of the First, Second, and Seventh
2 Causes of Action, said causes of action are DISMISSED without leave to amend.

3 2. To the extent the motion seeks dismissal of the Third, Fourth, Fifth, and
4 Sixth Causes of Action, said causes of action are DISMISSED with limited leave to
5 amend as set forth above. Should plaintiff wish to file an amended complaint for
6 purposes of curing the identified deficiencies, plaintiff shall file, no later than November
7 14, 2016, a Second Amended Complaint. Plaintiff may not, however, add any new
8 causes of action or add any new defendant without first obtaining leave of court. See
9 Fed. R. Civ. P. 15(a)(2).

10 In light of such dismissal, the Case Management Conference presently scheduled
11 for November 4, 2016 is hereby CONTINUED to February 10, 2017.

12 **IT IS SO ORDERED.**

13
14 Dated: October 26, 2016

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MAXINE M. CHESNEY
United States District Judge